# THE GENEVA AWARD AND THE INSURANCE COMPANIES.

ALTHOUGH the award of the Geneva Tribunal of Arbitration has undergone thorough discussion both in Congress and in the public press, it is still a subject of contention between two classes of claimants, to which the number may be said to be practically reduced: the insurance companies on the one hand, who have constantly asked only for admission to the Federal courts to test their claim upon the Government for moneys collected for them upon claims intrusted to it as agent, as they allege; and, on the other, the war-premium claimants, as they are termed, who seek to be reimbursed out of the Geneva award for the war premiums of insurance paid by them during the war, demanding from the Government that "abstract justice" which was denied them by the Geneva arbitrators who rejected their claims as invalid against Great Britain. This class resolutely oppose all reference of the question to the courts.

One cause of the protraction of the discussion over so long a period—since the Forty-second Congress—is the fact that the debates, able as they have been in both Houses, have always been addressed to a number seldom amounting to half the body. In May, 1874, Mr. Thurman said in the Senate: "Three-fourths of the Senators are away, and when this case comes to be decided they will come in here without having heard a word of the argument on either side, and some one will inquire, 'How does Smith vote?' another, 'How does Jones vote?' another, 'How does Tom vote?' and so they will follow some Jones, some Smith, some Tom, and so on, . . . and that will be the way in which justice will be administered by the Senate of the United States." Six years later, in closing the debate on his own bill in the last Congress, he had occasion to speak with the same bitterness of the absence of half the Senate, with the same reference to

"Smith, Tom, and Jones" as dictating Senators' votes on a question "which they are bound as judges to dispose of according to law and according to justice and according to common honesty." The small amount of trustworthy information which has reached the public has been insufficient to protect it against a prejudice which interested parties have created by a suppression of facts and, in some instances, it must be declared, by downright misrepresentation. We assert, in all sincerity, that we have never met with a disinterested opinion upon the case adverse to our own that did not spring from this prejudice. We purpose, therefore, to give the historical facts of this case, stating no fact that is not obtained directly from public and original sources, and omitting none that is in the smallest degree necessary to its entire comprehension. The facts shall be their own argument, and will be found not uninteresting to the general reader. The question of national morality involved in the action which the Government shall finally take is one of great importance, and its consideration is addressed to "plain people," Abraham Lincoln's happy synonym for common sense and common honesty. Except in Congressional debates and in occasional pamphlets that never reach the general reader, no full exposition of the case has ever come to our knowledge.

As early as November 20, 1862, less than four months after the Alabama left her British birthplace, Mr. Adams, our minister to Great Britain, laid before the Foreign Office claims of American citizens upon the British Government for indemnification for the loss of vessels captured by that cruiser. The ship Brilliant was captured on the 13th of September, 1861, and in January, 1863, the New York Mutual Insurance Company had filed their claim against Great Britain for the amount of the loss which that company had paid to the owners. These claims, and many more like them, were not filed in any spirit of patriotism or philanthropy. The parties making them believed that Great Britain was immediately responsible for the losses which they had suffered, and they demanded of their own Government to exact from Great Britain the repayment of the value of the property of which they had been despoiled. Captures multiplied, and claims from owners and from underwriters continued to pour in, and American ships were nearly driven from the ocean. But for the institution of marine insurance companies, the large majority of which are partnerships of individuals sharing among

themselves the losses of their fellow-members, while others are associations of capital giving security in consideration of a premium paid,—but for these institutions, few American vessels would have ventured out of port. Losses continued and popular clamor arose. National indignation was aroused. To the national honor the administration must look, but first and last American citizens and corporations were steadfast in their demand for a money indemnity in satisfaction for their losses. The accumulated claims became subsequently a serious danger, threatening war between the two nations. We all know that war was averted by a means worthy of two nations claiming the highest civilization. The fact that despite the hot blood and indignation of the period a treaty could be concluded, under which these international differences should be submitted to a high court of arbitration, justified the enthusiasm with which the event was received by the civilized world. Through much difficulty, and after frequently threatened failure, such a treaty was concluded, and the Tribunal of Arbitration met at Geneva.

Without pausing to moralize on the sacred character of such a tribunal, or the value to the merchant of the principle of arbitration, and all it implies, let us pass to the action of the United States Government toward its own citizens, both before and after the conclusion of the treaty.

In entering upon this most important passage in the history of the case, let us carry with us the knowledge that one class of claimants, those who are known as "war-premium" claimants, contend that the United States Government never assumed toward its citizens the relation of agent or attorney in any degree whatever in respect of the claims that were preferred at Geneva; and that the money recovered of Great Britain under the award of the tribunal was, in the language of their ablest advocate, B. F. Butler, "the money of the United States, to be disposed of at its pleasure, subject to no trust and especially to no legal rights in any individuals or corporations by whom a legal or equitable claim can be set up or maintained to any part of the sum awarded, as against the United States."* In a word, that the "claimants" were only witnesses in an action of trespass which the Government was bringing on its own account—for its own benefit, but, to some extent at least, at their expense. The

* Judiciary Committee's Report, Jan. 27, 1873.

fact upon which this assumption rests will be stated farther on in the order of its occurrence. The action of the Government, which is so summarily disposed of in this opinion, extends over several years. Let us follow it step by step.

As we have said above, claims of citizens and corporations began to pour in upon the Government as early as November, 1862, and were transmitted to our minister, Mr. Adams, and by him laid before the British Government almost as fast as they were filed. In February, April, July, August, September, and October, 1863, Mr. Adams laid before the Foreign Office a series of claims of our citizens upon the British Government. On the 26th of August, 1866, Mr. Seward transmitted to Mr. Adams "a summary of claims of citizens of the United States against Great Britain for damages suffered by them," saying: "Deficiencies will be supplied hereafter. The claims upon which we insist are of large amount. They affect the interest of many thousand citizens of the United States. The justice of the claims is sustained by the universal sentiment of the people of the United States." The episode of the Johnson-Clarendon treaty and its rejection by the Senate it is unnecessary to refer to, except to note that Mr. Fish wrote to our minister, Mr. Motley, March 15, 1869, to say to Lord Clarendon that the United States, in rejecting that treaty, "abandoned neither its own claims nor those of its citizens"; and on the 12th of November of that year he again writes of "the indemnity which [the President] thinks due by Great Britain to individual citizens of the United States." Finally, in his annual message to Congress of December, 1870, President Grant recommends "that authority be given for the settlement of these claims by the United States, so that the Government shall have the ownership of the private claims as well as the responsible control of all the demands against Great Britain."

As early as September, 1865, the Department of State had issued a circular addressed to "citizens of the United States having claims against foreign governments," calling upon them to "forward to this Department statements of the same under oath, accompanied by the proper proof." The circular comprises six paragraphs of general instruction as to forms to be observed; a most important and significant one, especially bearing on the responsibility assumed by the Government, is the following: "It is proper that the interposition of this Government with the

foreign government against which the claim is presented should be requested in express terms, to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim." Then follow fifteen rules to be observed, one being that "the Christian and surname of the claimant shall be set forth," and lastly, that "if the claimant shall have employed counsel, the name of such counsel shall be signed to the memorial."

Immediately after the treaty was concluded, the Department issued another circular informing claimants of the time within which claims must be filed. It contains these words: "It [the Government] will present to the tribunal at Geneva, to be taken into account in estimating the sum to be paid to the United States, all claims growing out of the acts committed by the several vessels which have given rise to the claims generally known as the 'Alabama Claims,' which may be presented to the Department in time to enable it to do so."

After the issue of this second circular of the State Department, there appeared for the first time the class known as the "war-premium" claimants: merchants who found in the heavy premiums which they had to pay for insurance against capture a loss and grievance for which they, too, held Great Britain to be liable, and for which consequently they filed claims for indemnity to be submitted, with all others placed in the hands of the Government, to the tribunal at Geneva.

As a matter of course, each claimant received from the Department of State an acknowledgment of his claim as it was filed. Here is the answer to a letter inclosing a claim from an insurance company: "Sir: I have to acknowledge the receipt of your letter of the 26th instant, enclosing the memorial of your company in the matter of their claim against Great Britain on account of the capture of the brig —— by the Florida, and in reply to inform you that the case will receive due attention. I am," etc. This is signed by J. C. B. Davis, Acting Secretary, who was subsequently agent for the United States at Geneva.

Under date of March 15, 1872, the State Department furnished to claimants a volume of three hundred and ninety-nine pages, entitled "A Revised List of Claims filed with the Department of State, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the Alabama Claims." The volume has for preface this "Note: In presenting the following list of claims, interest has not been cal-

culated or stated. The United States will ask the tribunal to award them interest on all claims which may be allowed, to be calculated from the date of damage done to each claimant to the date of final payment." And under the heading of the first page, "Interest on all amounts will be claimed up to the day of payment." In this volume, the claims of owners and insurance companies for the destruction by twelve cruisers and the two tenders of the Florida amount to nearly twenty millions of dollars. The claims for "increased insurance" fill a little over forty-eight pages, and amount to a little over six millions.

There is not upon the record of this case one circumstance, however trivial in character, as between the Government and its citizens, from the date of the first capture to the present hour, that does not go to prove that citizens of the United States, merchants and corporations, ship-owners and underwriters, the war-premium claimants included, regarding themselves as despoiled in their private property through the agency of Great Britain, sought reparation of their losses from that Government at the hands of their own; nor that the United States Government did not, by frequent public declarations and communications with claimants by circulars, by acknowledging to each individual the receipt of his claim with its vouchers, and by laying these claims in detail, scheduled by their agent and advocated by their counsel, before the Tribunal of Arbitration, constitute itself in the fullest manner the attorney and trustee of its own citizens to collect for them claims which in their individual capacity they were powerless to collect against a foreign power, and honestly to pay over to these citizens whatsoever should be recovered in their behalf. To assume the contrary, as is now being done by one class out of the several who thus sought the "interposition" of the Government, is to assume that a great nation is, by virtue of its sovereignty, absolved from the recognition of those principles of honor and honesty which are the law of existence of business communities, and the observance of which by your humble citizen is enforced by the town constable.

The mass of claims making up what was entitled "The American Case" was carried to Geneva by J. C. Bancroft Davis as agent of the United States, accompanied by Caleb Cushing, William M. Evarts, and M. R. Waite as counsel. The claims were classified under the following heads:*

* "The Argument at Geneva," p. 187.

*First.* The claims for private losses growing out of the destruction of vessels and their cargoes by insurgent cruisers.

*Second.* The national expenditures in pursuit of those cruisers.

*Third.* The loss in the transfer of the American commercial marine to the British flag.

*Fourth.* The enhanced payments of insurance by private persons.

*Fifth.* The prolongation of the war, and the addition of a large sum to the cost of the war.

Under date of December 8, 1871, just one week before the sittings of the tribunal commenced, Mr. Fish addressed a letter of instruction to the American counsel, which may be found at length in "Papers Relating to the Treaty of Washington," vol. 3, p. 414, where it occupies two pages. One passage of it, to which great importance has been attached by the advocates of the war-premium claimants, we copy:

"In the discussion of this question, and in the treatment of the entire case, you will be careful not to commit the Government as to the disposition of what may be awarded, or what may be recovered in the event of the appointment of the Board of Assessors, mentioned in the tenth article of the treaty. It is possible that there may be duplicate claims for some of the property alleged to have been captured and destroyed, as in the cases of insurers and insured. The Government wishes to hold itself free to decide as to the rights and claims of insurers upon the determination of the case. If the value of the property captured or destroyed be recovered in the name of the Government, the distribution of the amount recovered will be made by this Government without committal as to the mode of distribution."

It is upon this extract and this alone, unsupported by any other fact whatever, that the advocates of the war-premium claimants rely to absolve the Government from its responsibility as agent or trustee of private claimants. It appears by citation or reference in every argument made by them in the seven years' debates in Congress, where it is always made to do duty as the entire letter of instruction. One distinguished Senator committed the blunder of arguing upon it as having been written after the rejection of the war-premium claims by the tribunal, instead of one week before the tribunal met, regardless also of the fact that the writer of the letter had declared subsequently that the Government "never expected" compensation for the war-premium claims. There is not the slightest evidence that it was ever communicated to the arbitrators, as it certainly never

was to claimants. As for the letter itself as an authority, that it amounts to the assertion of a reserved right to reverse the decisions of the tribunal, which was one of *arbitration*, is not worth a contradiction; as to its real and obvious meaning, it is simply an assertion that where a claim is made for the same loss by an owner and an insurer, the Government reserves the right to decide as to which any award obtained shall be paid. Such it was assumed to mean by all the advocates of a reference to the courts. As a *reductio ad absurdum* of all that can be made of it, imagine the cashier of a bank, in forwarding a draft for collection, instructing the cashier to whom he remits it "not to commit this bank as to the disposition it shall make of the funds collected on this." Imagine the same cashier refusing to pay over to the drawer upon such a ground!

And now we approach the Geneva Tribunal of Arbitration, surely the most important body of the kind that ever assembled. It was to settle serious grievances between two powerful nations. It was to enact new statutes of international law, or at least to more clearly define those already existing, and thousands of our citizens looked to it to make good, or to reject, their claims against Great Britain, for losses which they alleged that they had suffered by the agency of that power.

On the 15th of June, 1872, the "American Case," made up and classified as we have above described it, was laid before the tribunal with the argument of our counsel, Messrs. Cushing, Evarts, and Waite. And now occurred the most important event in the history of the tribunal. Immediately upon the presentation of the American case, the counsel of the British Government declared that several classes of the claims therein presented were of a character so remote and "indirect," and in amount so indefinite and uncertain, that they did not, or would not, regard them as falling within the jurisdiction of the tribunal, and, in fact, were such claims as Great Britain was not willing to have submitted to an arbitration. They demanded, therefore, an adjournment of the tribunal until February, to enable them to confer with their Government for further instruction. The position thus assumed by Great Britain was near wrecking the whole scheme of arbitration. It was saved by the wisdom of the arbitrators themselves, and the course they pursued brought about at this early stage of their proceedings by far the most important and momentous result of their action.

On the 19th of June, just four days after this threatening attitude was assumed by Great Britain, the arbitrators met and pronounced a decision to the following effect: After stating that "the observations they are about to make" refer solely to the application of the British counsel for an adjournment, and "the motives for that application, viz., the difference of opinion which exists between Her Britannic Majesty's Government and the Government of the United States, as to the competency of the tribunal to deal with the claims advanced in the case of the United States, in respect of losses under the several heads of: *first*, the losses in the transfer of the American commercial marine to the British flag; *second*, the enhanced payments of insurance; and *third*, the prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion," they go on to say that they do not propose to express an opinion on this question of competency, but, as the difference of opinion between the Governments on this point might make the adjournment unproductive of any useful effect, and might "end in a result which both Governments would equally deplore, that of making this arbitration wholly abortive,"—"this being so, the arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the Government of the United States in respect to these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations. With a view to the settlement of the other claims to the consideration of which by the tribunal no exception has been taken on the part of Her Britannic Majesty's Government, the arbitrators have thought it desirable to lay before the parties this expression of the views they have formed upon the question of public law involved, in order that after this declaration by the tribunal it may be considered by the Government of the United States whether any course can be adopted, respecting the first-mentioned claims, which would relieve the tribunal from the necessity of deciding upon the present application of Her Britannic Majesty's Government."

This action of the tribunal was communicated to the Secretary of State on the 19th of June, 1872. On the 22d came the reply, which we give entire, omitting only the first paragraphs,

which merely repeat the communication received and the advice of their counsel thereupon:

"I have laid your telegrams before the President, who directs me to say that he accepts the declaration of the tribunal as its judgment upon a question of public law which he had felt that the interests of both Governments required should be decided, and for the determination of which he had felt it important to present the claims referred to for the purpose of taking the opinion of the tribunal.

"This is the attainment of an end which this Government had in view in the putting forth of those claims. We had no desire for a pecuniary award, but desired an expression by the tribunal as to the liability of a neutral for claims of that character. The President, therefore, further accepts the opinion and advice of the counsel as set forth above, and authorizes the announcement to the tribunal that he accepts their declaration as determinative of their judgment upon the important question of public law upon which he had felt it his duty to seek the expression of their opinion; and that, in accordance with such judgment and opinion, from henceforth he regards the claims set forth in the case presented on the part of the United States for loss in the transfer of the American commercial marine to the British flag, the enhanced payment of insurance, and the prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion, as adjudicated and disposed of; and that consequently they will not be further insisted upon before the tribunal by the United States, but are henceforth excluded from its consideration by the tribunal in making its award. FISH."

At the next meeting of the arbitration, two days thereafter, Lord Tenterden, the agent of Great Britain, filed with the tribunal a paper signifying the acquiescence of his Government in the views of the tribunal expressed in their declaration, and "Count Sclopis, on behalf of all the arbitrators, then declared that the said several claims for indirect losses mentioned in the statement made by the agent of the United States on the 25th instant, and referred to in the statement just made by the agent of Her Britannic Majesty, are, and from henceforth shall be, wholly excluded from the consideration of the tribunal, and directed the Secretary to embody this declaration in the protocol of this day's proceedings."

In this reply the United States Government solemnly accepts the decision of the tribunal declaring that all* the claims against Great Britain which form the national grievance against that power, together with the claims in behalf of its citizens for

* The claim for "Expenses in pursuit of cruisers" was subsequently debated and rejected.

"enhanced premiums of insurance," do not, "upon principles of international law," constitute foundation for an award of damages between nations. And they declare further that this decision is "the attainment of an end which the Government had in view in putting forth these claims," for which they frankly admit "they had no desire for a pecuniary award." The frankness of this declaration justifies the remark that has several times been made in Congress—that this decision was of infinitely greater value to this nation than the money award that followed it.

Every honest and intelligent mind will admit that this action excluded at once and forever all pretence that the war-premium claimants could have any further interest in the proceedings of the arbitrators or in any fund that should issue from their jurisdiction. In all that has been said or written in and out of Congress by the advocates of these claimants, this crisis in the history of the tribunal is entirely ignored, or alluded to in the most shadowy manner, or again, it cannot be denied, most unblushingly falsified. Here, for example, is the manner in which their ablest advocate dispatches it in a debate on Proctor Knott's bill. The speaker is a member of the House Judiciary Committee:

"The case went before the tribunal, and that tribunal decided to pay only national losses. The question was whether certain indirect losses, national losses, should be paid, and this question came very near wrecking that tribunal, but the good sense of the two countries removed this difficulty, and it was finally agreed that national claims, and they only, should be submitted." *

Their most recent advocate comments upon the same important crisis as follows:

". . . Let us go back to the sitting of the Geneva Tribunal. We find that the whole arrangement was in danger of a collapse, because Great Britain refused to go on if the United States insisted upon presenting to the tribunal claims for 'war premiums,' which Great Britain considered too consequential in their character and too uncertain in their amount. The difficulty was removed by a voluntary and unofficial statement by the members of the tribunal, that they would not consider any such claims if presented. The sittings of the tribunal then took place, and the American case was in part successfully presented, minus the 'war premiums,' which, under instructions from Washington, were not pressed after the intimation above-mentioned. It is important to say here that the counsel of the United States were distinctly instructed not to commit the Government to any theory of distribution," etc.

* "Congressional Record," January 19, 1879, p. 3.

These examples of the statements and reasoning of those opposed to a judicial reference of this case we may leave without comment.

We have now to consider the manner in which the tribunal dealt with the one class of claims which they did not reject as invalid. This class is entitled in the American case: "1. The claims for private losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers." It is not necessary again to allude to the manner in which these claims were gathered, nor to the correspondence between the Government and its citizens in relation to them. It will be seen that its action which followed was strictly in conformity with its promises to its citizens, and true to the agency it had assumed.

The United States Government included in its "case" a charge of liability for the destruction committed by twelve cruisers. Each one of these was the subject of separate argument between the counsel of the two Governments, and the whole occupied the deliberations of the tribunal during nearly two months. The result is known. Great Britain was adjudged to pay for all the destruction effected by the Alabama and the Florida, and by the Shenandoah after that cruiser had been refitted at the British port of Melbourne. For destruction by all other vessels that Government was held blameless. These other vessels have since been designated as the "exculpated cruisers," and owners of vessels destroyed by them are to be found to some extent among the claimants upon the fund. The advocate we have quoted places them next in right after the "war-premium men."

There remains but one important fact in the history of the Geneva Tribunal: the process by which that body arrived at the amount of fifteen and a half millions as the "sum in gross" to be paid by Great Britain in satisfaction of the claims brought against that Government. Here again, before entering upon the facts, we must refer to the use that has been made of this "award in gross" to supplement the argument that the Government repudiated from the beginning all responsibility to its citizens as an agent or trustee for claimants. We copy this extraordinary paragraph by the same advocate, in which the two points are ingeniously brought together:

"On the side of the other hypothesis [of non-agency] we discover, in the first place, that the Government took ground against the idea of acting as an

agent in instructing its representatives at Geneva not to commit it to any theory of distribution. And we cannot otherwise account for the scrupulous anxiety of the tribunal to keep secret the method it adopted in calculating the amount of the award except on this hypothesis, and that they wished to avoid laying any foundation for the former."

This assertion of an anxiety for secrecy on the part of the tribunal as to its action on this point, and the inability of the writer to account for it except on the hypothesis that the arbitrators desired to protect our Government against any responsibility as an agent,—when not a shadow or even pretence of evidence exists that the instructions of Mr. Fish to the counsel were even indirectly known to them; when, in fact, as will appear, the counsel appealed to the arbitrators to make the award large enough to surely cover the obligations of the Government to its citizens,—is very characteristic of the sophistry, or something worthy of a harsher name, which forms the entire tissue of the argument of those who are striving to keep this question out of the courts. We have never heard of these efforts at secrecy, but whatever they were, they were a failure. Let us turn to the facts.

The sum to be determined was a compensation for the destruction of material property owned by various parties, and the measure of the loss was to be the measure of the compensation. The assertion that has been made that the award had no reference to the losses of claimants, but was a sum flung at random to the United States in full satisfaction of the national grievance, is, in view of the facts, too silly for contradiction. A few phrases from the argument of Chief-Justice Cockburn, the British commissioner, are sufficient to settle this point, were anything needed to do so:

"We have therefore only to deal with the claim *for losses sustained by individual citizens.*

"Now, there can be no doubt that the only damages which the tribunal is authorized to award under the treaty for the *indemnification of American citizens* must be confined to loss actually sustained by destruction of ships, cargoes, or personal effects. Where damage to property arises, not directly from willful injury, but indirectly only, from want of due care, an indemnity against actual loss is all that, by the law of England or America, or by any principles of general jurisprudence, can possibly be awarded.

"If, therefore, this tribunal, instead of sending the amount to be paid by Great Britain to be ascertained by assessors, should think fit to award a sum in gross, as it is empowered to do by the treaty, it must still, in fixing the latter, proceed on the best estimate it may be enabled to arrive at, on the

data before it, *of the losses actually sustained by American citizens through the three ships for which Great Britain is held to be liable.*" *

Not a shadow of doubt can exist that, in making up their award, the tribunal had reference solely to the class of private claims, as laid before them by the American agent.

To adjust a fair valuation of one hundred and twenty-nine vessels, their cargoes, freight, and the personal effects of officers and crew, between a rather irritated claimant and a reluctant payer, could under no circumstances be an easy problem in figures, and it goes without saying that in the end such an adjustment must become more or less a matter of compromise. It was so in this case. It is interesting to note how the compromise was arrived at, and, at the same time, the fairness and fidelity of counsel on both sides in dealing with the facts before them.

At an early stage of the proceedings—April 15, 1872—the American counsel placed in the hands of the British counsel the revised list of private claims. This list was by the British counsel referred to a committee which, at the request of Earl Granville, the British Foreign Secretary, had been appointed by the London Board of Trade to assist them at Geneva. The report of this committee, dated June 8, 1872, is to be found in "The Argument at Geneva," where it fills, with its tabular statements, thirty-five pages. The report indicates thorough and conscientious work. To a suggestion on the part of the examiners that the schedule of claims had not been as thoroughly audited by the American Government before presentation as it should have been, the American agent replies: "On the contrary, they were carefully scrutinized, document by document and proof by proof, under the superintendence of the solicitor of the United States in these proceedings, and the abstract of the proof was in every case completely verified with the original documents on file in the Department at Washington and referred to in the Revised List of Claims."

The valuations of property in this list as it comes from the hands of the committee, and as they subsequently appear in the comparative tables submitted by the American and British counsel, are represented by the claims filed by private owners of property uninsured, and by those of the insurance companies who had

* Papers relating to Treaty of Washington, vol. 4, p. 537.

paid owners who were insured for the total loss of their property, and by no other parties whatever. No other parties than these had a shadow of right, legal or equitable, to represent these values—no other parties than these were damnified by their destruction. And here it is proper to state, for the uninformed, the principle of law under which the insurance companies became claimants against Great Britian.

By a principle as old as the first guarantee ever assumed by man, and holding good in every conceivable form of guarantee, as the indorsement of a note, the warranty of a debt, or the insurance of property against fire or flood, shipwreck or capture, whenever the guarantor discharges his responsibility, and makes good to the owner the value of whatever he has insured, he instantly, by that act, enters absolutely into all rights whatever which the owner had, has, or may have in the note, the debt, or the property paid for. The decisions of the highest authorities in Great Britain and the United States give to an insurance company which has paid a total loss all that may be recovered of the thing lost, or any compensation therefor, including what may be recovered of a foreign power for illegal captures, whether by voluntary payment, or as the result of reprisals made in satisfaction of them. The British counsel, jointly with the committee of the Board of Trade, recognized the same principle in the following extract from their argument:

"The American insurance companies, who have paid the owners as for a total loss, are, in our opinion, entitled to be subrogated to the rights of the latter, according to the well-known principle that an underwriter who has paid as for a total loss acquires the rights of the assured in respect of the subject-matter of insurance. This principle was explained and acted on in the well-known English cases of Randall *vs.* Cochran, 1 Ves. Sen., 98, and the Quebec Fire Insurance Company *vs.* St. Louis, 7 Moore, P. C. 286, and is well recognized by the courts of America."

There is no question, therefore, that the right of the insurance companies to claim, by subrogation, the value of the property for which they had paid total loss was adjudicated by the tribunal, and that their claims were, upon that principle, passed on the same footing as those of direct owners. It is to be observed that the principle does not enter into the claim of the insurance companies upon the fund in the hands of the Government, which is simply a claim for money actually belonging to them as having been recovered on their account. Nevertheless, in the debates

in Congress the "right of subrogation," as affecting the claims of the companies, has been the subject of some very silly talk, one eminent Senator declaring that the right had been "abolished yesterday." The writer already quoted likewise adds a new feature to the old law. "Your case," he says to the underwriter, "hardly comes within the reason of the technical rule, which is intended to cover remnants and not perfect restoration."

To return to the making up of the award. The problem was, of course, to give damages sufficient to cover the claims. On this point our counsel made a special appeal, urging that "the United States will be bound to these losers to pay the amounts of their claims, and if you do not make it sufficient, the United States will have to make good the deficiency." On the 19th of August, 1872, in compliance with the request of the tribunal, the agents of the two Governments presented their "comparative tables," to show the differences which then appeared between them after such discussion as followed the analysis of the Board of Trade committee. We must here repeat the fact that the "comparative tables" are now reduced to a schedule of such losses as only uninsured owners, and insurance companies who have paid owners for a total loss, have any legal right to claim for. From the introduction to the American tables we copy the following passage which, consistently with every other fact in the history of these claims, sets forth exactly the relation of the Government to its citizens, and the responsibility resting upon it, in the view of the agent and counsel by whom it was represented:

"The claims presented by the United States are supported by sworn statements presented by those who possess the necessary information, and they exhibit in detail the items which go to form the sum total, and the names of all who have made reclamation, whatever may be the sum the tribunal may see fit to award. The claims on the part of private individuals thus computed, verified, and submitted are supported by all the guarantees of their good faith and their validity, as well for their general amount as for the other facts concerning them which governments are in the habit of requiring, in such cases, from their own citizens. It thus appears that these computations show the entire extent of all private losses which the result of the adjudications of this tribunal *ought to enable the United States to make compensation for.*"

The question of the allowance of interest was warmly contested by the British counsel, Sir Roundell Palmer, who ventured the argument that the insurance companies at least should not be

allowed interest, upon the ground that, doubtless, in the main the war premiums they had received had paid them a profit. Mr. Cushing replied to this with a touch of scorn. "We did not expect that the war premiums which the British Government could not tolerate as being 'too indirect' when presented by the merchants who paid them, should nevertheless be 'direct' enough . . . to reduce the indemnity on insured losses, which, if uninsured, they would have been entitled to." *

After a consideration of the "tables" by the tribunal, the commissioners placed the entire mass of estimates in the hands of Mr. Stæmpfli, with instructions to reduce them to a synoptical table upon which a just award might be arrived at. "That man of business and long-headed man," as he is called by Mr. Thurman, "went back to his home and took these estimates with him, and spent days and days revising and going over them." The result of his labor is a synoptical table footing up $11,893,000, which is to be found in the proceedings of the tribunal of 2d September, 1872. To this amount interest was added upon an estimate as to time and a rate previously determined, and on the same day the sum of $15,500,000 was agreed upon as the amount to be paid to the United States by Great Britain in satisfaction of all claims.

This concludes the story of the Geneva Tribunal of Arbitration, and its dealings with all the various claims that were laid before it for adjudication. We have told it with a prolixity and possibly a repetition of facts which we have found necessary to a perfect understanding of the case in its simplicity, and at the same time have fully exposed the sophistry and misrepresentation of which it has been the subject. There remains to be told what has been done by the Government toward its own citizens who placed their claims in its hands and what is yet to be done.

In the "comparative tables," the addition of which we have seen was the important factor in making up the award, the claims of the insurance companies form close upon seven-sixteenths of the amount; and had these claims never been preferred, it is obvious that the final award would have been for about eight and a half millions. It is likewise as obvious that, had no claims but those for war premiums been preferred, the award would have been *nil.*

* "Argument at Geneva," pp. 558 and 570.

The uninsured owners have long since been paid their claims under a judicial commission appointed by Congress, which by the law creating it was forbidden to admit before it the claims of the insurance companies. A prejudice only consistent with gross ignorance, but having just now a large representation in all legislative bodies in this country, seems to treat insurance companies as bodies who, to use a very hackneyed but strong expression, have no rights that any person is bound to respect. Immediately upon the introduction of the subject into Congress, the idea that any of this money was to be paid to an insurance company seemed to fire with indignation a large number of legislators, and the words, "The Government did not go to Geneva to collect claims for a parcel of insurance companies," or others to the same effect, may be found very often on the pages of the "Congressional Record" of that period. They are still denied even access to a court to lay before it their claim to property—a right which, it is safe to say, no member of Congress would incur the odium of denying to the humblest tradesman. Subsequently, the privilege has been extended them of receiving such amount of their claims as might remain after deducting from them all the war premiums they had received on war risks insured.

From this suppression of the insurance companies seems to have sprung the revival of the war-premium claims and the hopes of the claimants. If, as the argument went, the action at Geneva had no reference whatever to the private claims carried there, and the Government was still to distribute the fund on principles of abstract justice, why should the rejection of the war-premium claims by the tribunal be any bar to their getting them out of the award?

In this connection we have to deal with one argument that has been most freely used against the claims of the insurance companies, of which it is impossible to speak except in terms of the severest animadversion—one which rests upon a principle so utterly at variance with the simplest rights of property as recognized among men, that it is not our fault if its statement carry an unpleasant imputation upon the persons who use it. In and out of Congress, the fact that the insurance companies have prospered in their legitimate business, has been urged as a substantial and the most potent reason for denying them whatever rights they claim in the award, or even a standing in court to try them. The argument is more worthy of the sand-lots of California than

of the legislative halls or the press of a civilized nation. The principle that a man's rights of property shall depend upon the balance of his profit and loss account is simply infamous, and a disgrace to any one bearing the name of lawyer or merchant, who uses it or allows it to be used in his behalf. What would such a person say were he denied his dividend from the assets of an insolvent upon the ground that his dealings with the debtor had always been profitable? And further: the application of this argument to the claims upon the Geneva award is simply three-fourths an untruth. About three-fourths of these claims are owned by mutual companies, who are really associations of individuals for the division of losses among themselves, each one paying his exact and proper share of each loss the association suffers. There is in their business neither profit nor the semblance or possibility of profit in any form. Each member of the partnership puts up a sum proportioned to his own amount at risk. Out of the fund thus formed losses are paid, and what is left is, after a certain time, returned to those who advanced it. Each member's share of this common loss is unrelieved by assistance from any source whatever — as real as the uninsured thirty-five thousand dollars in the ship Jacob Bell was to her owners, who doubtless have long since been reimbursed out of the award. Each member of each mutual company remains to this hour poorer, to the extent of his contribution to the losses of his company, and it is his contribution to losses by the Florida — say, among others, his share of the fifteen thousand dollars war risk paid on the Jacob Bell — which he is now waiting to have repaid him out of the same award. It is not within the bounds of possibility that this arithmetical fact, that the members of the mutual insurance companies, claiming three-fourths of all that is due to these pariahs, are as absolute losers as the uninsured owners, should be unknown to any war-premium claimant, or to any one of their advocates, and that the assertion that they have made profit in any sense out of the business of insurance during the war is without the slightest foundation in truth.

And as for the stock companies claiming the other one-fourth: they are owned and managed exclusively, it may be said, within the class with which alone they deal. Too numerous to become in the nature of things either monopolists or extortionists · accustomed to the observance of a contract to which the

law gives a peculiar name, indicative of the "overflowing" good faith that enters into it, nothing but very gross ignorance can presume to make our marine insurance companies the object of odium or contempt. Their stockholders are merchants; doubtless many of them have paid war premiums with the same hand that drew their greatly exaggerated dividends. Are they less entitled to the protection of the law than their war-premium associates?

By what method shall the sum remaining in the hands of the Government be disposed of? The ablest members of both Houses of Congress have steadfastly endeavored to send all claimants to the Federal courts—a course not only in accordance with every precedent that has hitherto arisen in the history of the Government, but the only one leading to a settlement that must command the acquiescence of every claimant—a result that can never be reached by any act of Congress. The question of the responsibility of the Government and the character of the award as a trust fund can only be settled, if it be necessary to carry it so far, by the Supreme Court. No misappropriation of this money, if it be a trust, can extinguish the claims upon it. Senator Bayard put this fact in a forcible light in the last debate in the Senate* on Senator Thurman's bill—the ablest debate the subject has ever undergone. The bill was laid on the table. In December, 1878, a bill was introduced in the House of Representatives by Hon. J. Proctor Knott, from the Judiciary Committee, authorizing "all persons and corporations claiming to be entitled to any portions" of the award, to sue for the same in the United States Court of Claims, which shall render judgment for such amount as they "shall be justly entitled to recover under said treaty and award, according to the principles of justice, equity, and the law of nations, without regard to any rule or principle of allowance, exclusion, inclusion, or distribution heretofore adopted by Congress." The bill also provided for a direct appeal to the Supreme Court on the part of any claimant. In closing his report on the bill, Mr. Knott uses these words, which commend themselves to the common sense and common honesty of every one: "Surely no one who claims to have any right to any portion of this fund can object to having his claim thus adjudicated, unless he is afraid of justice." The bill was not passed.

* "Congressional Record," April 14, 1880, p. 19.

It was stigmatized during the debate as a bill for the benefit of insurance companies, although they were not mentioned in it. The final action of the Government on this question must concern every citizen. An unwillingness to submit to the law of the land, and a disposition to appeal to arbitrary power to set it aside, can never be approved by this nation. In a few words of Burke, stern and warning, we take leave of the subject: "Law and arbitrary power are in eternal enmity. . . . We may bite our chains if we will; but we shall be made to know ourselves, and be taught that man is made to be governed by law, and he that will substitute will in the place of it is an enemy to God."

GEORGE B. COALE.